

**BEFORE THE DIRECTOR OF THE
DEPARTMENT OF PESTICIDE REGULATION
STATE OF CALIFORNIA**

In the Matter of the Decision of
the Agricultural Commissioner of
the County of Contra Costa
(County File No. 1070206)

Administrative Docket No.110

DECISION

ROBERT S. WILEY
P.O. Box 120
Phillipsville, California 95559

Appellant /

Procedural Background

Under Food and Agricultural Code (FAC) section 12999.5 and section 6130 of Title 3, California Code of Regulations (3 CCR), county agricultural commissioners may levy a civil penalty up to \$1,000 for certain violations of California's pesticide laws and regulations.

After giving notice of the proposed action and providing a hearing, the Contra Costa County Agricultural Commissioner found that the appellant, Robert S. Wiley, violated 3 CCR section 6614(b)(3). The commissioner imposed a penalty of \$500 for the violation.

Robert S. Wiley appealed from the commissioner's civil penalty decision to the Director of the Department of Pesticide Regulation. The Director has jurisdiction in the appeal under FAC section 12999.5.

Standard of Review

The Director decides matters of law using his independent judgment. Matters of law include the meaning and requirements of laws and regulations. For other matters, the Director decides them on the record before the Hearing Officer. In reviewing the record, the Director looks to see if there was substantial evidence, contradicted or uncontradicted, before the Hearing Officer to support the Hearing Officer's findings and the commissioner's decision. The Director notes that witnesses sometimes present contradictory testimony and information; however, issues of witness credibility are in the province of the Hearing Officer.

The substantial evidence test requires only enough relevant information and inferences from that information to support a conclusion, even though other conclusions might also have been reached. In making the substantial evidence determination, the Director draws all reasonable inferences from the information in the record to support the findings, and reviews the record in the light most favorable to the commissioner's decision. If the Director finds substantial evidence in the record to support the findings and decision, the Director affirms the decision.

3 CCR section 6614(b)(3)

Section 6614(b)(3) prohibits a pesticide application being “made or continued when there is a reasonable possibility of contamination of nontarget public or private property, including the creation of a health hazard, preventing normal use of such property. In determining a health hazard, the amount and toxicity of the pesticide, the type and uses of the property and related factors shall be considered.”

There is information in the record that the appellant made an aerial application of pesticides including Dimethoate 4E to a 63-acre tomato field located west of a U-pick apricot orchard and residence on June 3, 2001. There were approximately 83 feet between the treated edge of the tomato field and the first row of apricot trees. At the time of the application, the wind was blowing between 3.5 to 4.5 miles per hour from the west. The Dimethoate 4E label states “Do not apply when weather conditions favor drift of spray from areas treated.”

Laboratory analyses of swab samples taken by the county from the apricot orchard and the residence on June 6, 2001, tested positive for the presence of Dimethoate. A sample from the window nearest the front door of the residence showed 0.59 micrograms of the pesticide, and a sample from a side window showed 0.50 micrograms of the pesticide. Laboratory analysis of apricot foliage from the row of trees closest to the tomato field showed 0.47 parts per million of the pesticide, and, from the fifth row of trees, there was 0.25 parts per million of the pesticide.

The Dimethoate 4E label states that the pesticide may be fatal if swallowed and may cause eye injury. The label also warns, “Harmful if absorbed through skin. Do not get into eyes. Avoid breathing vapor or spray mist. Do not contaminate food or feed products.” Regarding reentry warnings for treated agricultural areas, the label states: “Do not enter or allow worker entry into treated areas during the restricted entry interval of 48 hours.” For other areas, persons are to stay out of treated areas until the spray has dried.

The Dimethoate 4E label information indicates that the contaminated residence posed a health hazard to the owner and his family, and that the contaminated orchard foliage posed a health hazard to the owner and his family and to members of the public who might enter the orchard and have skin contact with the contaminated foliage within 48 hours of the application.

The owner of the residence and the apricot orchard and his family stayed indoors for four hours after the application on June 3, 2001, to prevent potential pesticide contact. The owner noted that there was a strong pesticide smell around the house and the orchard.

The commissioner's office required the owner of the apricot orchard to partition off the part of the U-pick orchard that was sprayed to prevent the public from harvesting fruit from the contaminated area. Dimethoate 4E is not labeled for use on apricots, and there is no tolerance for Dimethoate residues on apricots. The public was not allowed to pick apricots until the commissioner's office received laboratory results showing no detectable Dimethoate residues on the apricots. The normal use of the property was altered in this case, since the family stayed indoors to prevent potential pesticide contact and the contaminated part of the apricot orchard was partitioned off and closed to the public the weekend after the pesticide application.

A reasonable inference from the information in the record is that the appellant's Dimethoate application was made when there was a reasonable possibility of contamination of nontarget private property (i.e., the apricot orchard and the residence), including the creation of a health hazard, preventing normal use of the property.

Conclusion

The record shows the commissioner's decision is supported by substantial evidence, and there is no cause to reverse or modify the decision.

Disposition

The commissioner's decision is affirmed. The commissioner shall notify the appellant how and when to pay the \$500 penalty for its violation of 3 CCR section 6614(b)(3).

Judicial Review

Under FAC section 12999.5, the appellant may seek court review of the Director's decision within 30 days of the date of the decision. The appellant must bring the action under Code of Civil Procedure section 1094.5.

STATE OF CALIFORNIA
DEPARTMENT OF PESTICIDE REGULATION

By: Original Signed by
Paul E. Helliker, Director

Dated: June 26, 2002